SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term 1968

No. 674

WILLIAM P. T. PRESTON, JR., and PHYLLIS PRESTON LEE,
Petitioners,

against

UNITED STATES TRUST COMPANY OF NEW YORK, WILLARD S. SIMPKINS and ROLAND L. REDMOND, as Trustees under two Deeds of Trust made by WILLIAM P. T. PRESTON, SR. on February 24, 1931 and December 11, 1942, respectively, ELIZABETH PRESTON HUTCHINGS and DORIS PRESTON,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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HELENE E. SCHWARTZ
of Counsel

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PETITIONERS' REPLY MEMORANDUM

It is difficult within the space available in a reply memorandum to straighten out the complexities in this case resulting from the procedures of the courts below in dismissing the complaint for failure to state a claim upon which relief can be granted (18a, 20a) although the motion had been made on the ground of *res judicata* (11a-12a; 19a). That the judgment and the opinions both say this, respondents do not deny.

Although it is true that the District Judge overruled the argument of conflict of interest, he did so only by way of dictum and on the theory that Grantor's interest was at "all times" "freely alienable" (18a), quoting a provision in the state court judgment that referred not to the restrictions of the 1931 Trust, but to restrictions in the will of William P. Thompson relating to some Nassau County real estate

(1c). That Mr. Thompson's will is irrelevant to the issues of the case is demonstrated by the fact that it had never been advanced by the respondents in the District Court and that it was ignored by respondents when in the Court of Appeals and by the Court of Appeals in deciding the case.

The Court of Appeals upheld the judgment on the ground that the complaint failed to state a claim upon which relief could be granted, because of the "factual theory" that Fanny's consent was based on "bargaining" (3a), "was represented by highly competent counsel when she bargained" (9a), etc. These are facts which respondents had never claimed in their statement of facts under District Court Rule 9(g) (24a-27a) and which petitioners were under no notice to meet, either in the District Court or in the Court of Appeals when they made the statement quoted on page 2b, a statement which the Court's opinion showed to be a misapprehension.

The erratic course of this case in the courts below make demonstration difficult within the limitations of certiorari. Nevertheless, respondents do not, and cannot deny, that the motion was granted on a ground other than that upon which it was made and affirmed on the same ground (11a-12a; 18a; 19a; 20a) in an opinion which advances what we submit is the wholly untenable theory that on a motion to dismiss upon an affirmative defense the plaintiff must submit prima facie proof of the allegations of the complaint. It is these unquestioned rulings which are the basis of this petition.

These rulings, we submit, fail to comply with Rule 7(b)(1) promulgated by this Court and present a question of general interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

New York, New York
November 21, 1968

Respectfully submitted,

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HAROLD D'O. BAKER
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Extract From 1943 State Court Judgment

Twentieth: The will of William P. Thompson devised to the defendant William P. T. Preston a vested estate in remainder in the house and grounds at Westbury, Nassau County, New York, owned by said testator. Upon the death of Edith B. Thompson said estate in remainder became an estate in fee simple absolute. The interest of said William P. T. Preston in said property has at all times since its creation been fully and freely alienable. So much of said will as purports to prohibit the sale of said property is void and ineffectual, and should be disregarded.